



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC CASE NO. 342 OF 2017**

**WILLIAM NZUKI MUNGE.....PLAINTIFF/RESPONDENT**

**VERSUS**

**DAVID MUTUKU SILA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**THE LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT /APPLICANT**

**NATIONAL LAND COMMISSION.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1) What is before this court for ruling is the first Defendant's/Applicant's notice of preliminary objection dated 06<sup>th</sup> March, 2018 and filed in court on even date. In the notice, the first Defendant/Applicant has raised three grounds namely:-

**1. The Plaintiff's suit is a non-starter.**

**2. The Plaintiff has no locus standi to present this suit before court and the honourable court ought not to entertain it.**

**3. The Plaintiff's suit offends the explicit provisions of the Law of Succession Act and Civil Procedure Act and the Rules made thereunder as the subject matter of this suit is registered in the names of a person who is long deceased namely, MutukuSila and nobody has ever obtained letters of administration or probate to his estate.**

2) On the 30<sup>th</sup> April, 2018 the court directed that the notice of preliminary objection be disposed off by way of written submissions. By the time of writing this ruling, it is only the Plaintiff/Respondent who had complied with the court's directive.

3) In their submissions, the Counsel for the Plaintiff's Counsel submitted that the preliminary objection cannot be sustained since the Defendants/Applicants never entered appearance nor did they file their defence and as such, the first Defendant/Applicant has no locus standi to file the same. The Counsel further submitted that the defence is not properly filed taking into account that no leave was ever sought to have the same filed out of time. The Counsel urged the court to expunge the memorandum of appearance and defence and to dismiss the preliminary objection to the Plaintiff/Respondent.

4) In support of their submissions, the Plaintiff's/Respondent's Counsel cited the case of Mukisa Biscuit Manufacturing Co.Ltd V West End Distributors Ltd [1969]EA 696 which defines what a preliminary objection is. In the aforementioned case, the court held:-

***"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."***

5) The counsel also cited the case of Oraro V Mbaja (2005) eKLR where Ojwang, J (as he then was) held that:-

***"A preliminary objection correctly understood, is now well identified as, declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not a matter of legal principle, a true preliminary objection which the court should allow to proceed."***

6) The counsel also cited the case of Eglyne Chepchirchir Choge & 3 others VS Singa Ham Edambo & 3 others [2018] eKLR where the Defendant/Applicant raised a preliminary objection seeking for the dismissal of the Plaintiff's/Respondent's suit. In the aforementioned case the court held thus:-

***“... the court is being put in an awkward situation where it is supposed to look elsewhere to verify the facts submitted by Counsel. This therefore does not amount to preliminary objection.”***

7) Having looked at the notice of preliminary objection filed by the first Defendant/Applicant together with pleadings herein and having read the Plaintiff's/Respondent's submissions, I do note that from the affidavit of service sworn at Machakos on 26<sup>th</sup> February, 2018 and filed in court on 28<sup>th</sup> February, 2018, the first Defendant/Applicant herein was served on the 07<sup>th</sup> February, 2018 with summons to enter appearance and to file his defence. The first Defendant/Applicant ought to have entered appearance within 15 days from the date of service upon which he would have had another 15 days to file and serve his defence. The first Defendant entered appearance on the 06<sup>th</sup> March, 2018 vide memorandum of appearance dated 6<sup>th</sup> March, 2018 through M/s J.N Kimeu & Co. Advocates. Whereas the first Defendant/Applicant could enter appearance at any time he so wished, it is clear that his statement of defence dated 20<sup>th</sup> March, 2018 and filed in court on even date was filed without leave of the court. I will expunge the same from the record. That will leave the court in an awkward position as was the case in the aforementioned case of Eglyne Chepchirchir Choge and 3 others Vs Singa Ham Edambo & 3 others [2018]eKLR.

8) The upshot of the foregoing is that the facts of this suit remain as pleaded by the Plaintiff. As such, the objection by the first Defendant does not amount to a notice of preliminary objection. Same is hereby dismissed with costs to the Plaintiff/Respondent.

**Signed dated and delivered at Makueni this 23<sup>rd</sup> day of January, 2019**

**MBOGO C. G,**

**JUDGE.**

**In the presence of:-**

Ms Kyalo for the Plaintiff/Respondent

Court Assistant – Nzioka

**MBOGO C.G, JUDGE**

**23/1/2019**